No. 87-431

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Appellant

v.

CHAN KENDRICK, *et al.*,
Appellees

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE ATTORNEYS GENERAL OF ARIZONA, LOUISIANA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, UTAH, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANT

Of Counsel:
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

GARY B. BORN
Counsel of Record
R. SCOTT KILGORE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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This amicus curiae brief is submitted in support of appellant Otis R. Bowen, Secretary of Health and Human Services. By letters filed with the Clerk of the Court, appellant and appellees Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts and The American Jewish Congress have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are the Attorneys General of Arizona, Louisiana, Missouri, New Hampshire, New Mexico, Utah, and Washington. These States devote substantial resources to welfare programs that provide vital social services for the misfortunate and less-privileged. As de-

scribed below, many State welfare programs involve private organizations, including both religious and nonreligious groups. The district court's decision threatens to disrupt these welfare programs and the social services they provide. The amici curiae are responsible for defending the legality of the welfare programs in their States and for coping with the social consequences of any disruption in welfare services. The amici curiae accordingly have a direct interest in this case.

STATEMENT

This case involves an Establishment Clause challenge to a social welfare program administered by the Federal Government. The challenged program was established by the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.* (1982) ("AFLA"), which authorized appropriations "for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. No. 161, 97th Cong., 1st Sess. 1 (1981). The AFLA was enacted after Congress concluded that premarital adolescent pregnancy and childbirth caused "severe adverse health, social, and economic consequences." 42 U.S.C. 300z(a)(5) (1982).

To combat these social ills, AFLA authorized funding for "prevention services" and "care services" for adolescents and their families.[1] Like many other government welfare programs, AFLA funding is available to "religious and charitable organizations, voluntary associations, and other groups in the private sector." 42 U.S.C. 300z-5(a)(21)(B) (1982). There are two major limitations on appropriations under the Act. First, no

[1] These services include: (A) pregnancy testing; (B) mental and physical health services; (C) referral for venereal diseases, pediatric care, residential care, and mental health services; (D) adoption counselling; (E) sex education; (F) child care; (G) transportation; (H) outreach services and counselling for families; and (I) family planning. 42 U.S.C. 300z-1(a)(4) (1982).

grants may be made for abortion, abortion counselling, or certain abortion referrals. 42 U.S.C. 300z-10(a) (1982). Second, the Act's legislative history explicitly prohibits "the use of [AFLA] funds to promote religion, or to teach the religious doctrines of a particular sect." S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984); S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981).

The district court declared AFLA unconstitutional, both on its face and as applied, "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1551 n.2, 1570 (D.D.C. 1987). Relying on this Court's parochial school decisions, the lower court held that AFLA has the "primary effect" of advancing religion, both on its face and as applied. The court also held AFLA facially unconstitutional because it "entangles" government with religion.

SUMMARY OF ARGUMENT

This case requires the Court to decide fundamental questions regarding the Nation's social welfare programs. Since the founding of the Republic, religious organizations have cooperated with federal, state and local governments in caring for the unfortunate and less-privileged. In contrast to government aid to parochial schools, cooperation in the social welfare field has produced relatively little controversy. Instead, for nearly 200 years, this cooperation has provided food, shelter, medical care and other essentials to millions of needy Americans. The lower court's decision threatens to disrupt these long-established patterns of religious-governmental cooperation and the social services they provide.

The district court erred by applying the three-prong *Lemon* test, which was fashioned in the uniquely sensitive context of primary and secondary education. Particularly intensive scrutiny of governmental aid in this field has been justified by an unusual constellation of factors,

including historical controversy, the role of public schools in fostering national cohesion, and the potential of parochial schools for religious indoctrination. Because these factors are largely absent in the social welfare field, it is inappropriate to apply the *Lemon* test in this case.

The appropriate standard in this case should instead be derived from *Bradfield v. Roberts*, 175 U.S. 291 (1899)—this Court's only Establishment Clause decision in the social welfare context. Under *Bradfield*, governmental aid to religious groups is permissible if the assistance is: (1) neutrally available to both religious and nonreligious groups; and (2) used for secular social welfare services. AFLA clearly survives any constitutional challenge under *Bradfield*'s analysis. First, the Act neutrally provides funding to both religious and nonreligious groups. Second, AFLA funding is available for social welfare services which are plainly secular (including transportation and medical treatment). Because there are indisputably circumstances in which religious groups could constitutionally provide these services, the district court erred in holding AFLA as a whole unconstitutional on its face. *United States v. Salerno*, 107 S. Ct. 2095 (1987).

AFLA's appropriations for counselling on sexual relations and abortion are also facially constitutional. As Congress's findings demonstrate, these are legitimate subjects of secular concern which can readily be dealt with in a secular, nonreligious manner. The fact that some government-funded advice about sexual matters "happens to coincide or harmonize with the tenets of some or all religions" is irrelevant. *Harris v. McRae*, 448 U.S. 297 (1980).

The district court also erred in striking down the Act "as-applied." In addition to ignoring Congress's prohibition against funding for religious indoctrination, the court failed to examine rigorously either the individual AFLA grantees or their services. Absent adequate findings on

these issues, there is no basis for the lower court's conclusion that AFLA funds were used for "religious," rather than "secular," activities.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE SHOULD BE INTERPRETED IN LIGHT OF THE LONG TRADITION OF COOPERATION BETWEEN RELIGIOUS GROUPS AND GOVERNMENT AGENCIES IN PROVIDING SOCIAL WELFARE SERVICES

The Court has often recognized "the special relevance in [the Establishment Clause] area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" [2] Thus, the Court's parochial school decisions have relied extensively on the fact that the "subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed." [3] These decisions also relied on the prohibitions against parochial school aid adopted during the 19th century in many States, usually by constitutional amendment. In Justice Brennan's words, "for more than a century, the consensus, enforced by legislators and

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[2] *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 777 n.33 (1973). *See also Walz v. Tax Comm'n*, 397 U.S. 664, 675-76 (1970); *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring).

[3] *Lemon v. Kurtzman*, 403 U.S. 602, 645 (1971) (Brennan, J., concurring). *See Id.* at 611-14, 624-25; *Id.* at 628-30 (Douglas, J. concurring) ("conflict and dissention" "often erupting into violence"); *Everson v. Board of Educ.*, 330 U.S. 1, 14 (1947); *Id.* at 23 (Jackson, J., dissenting) ("It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies."); *Id.* at 33 (Rutledge, J., dissenting); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210-211 (1948); *Id.* at 213-20 (Frankfurter, J., concurring) ("the Remonstrance of James Madison, an event basic in the history of religious liberty, was called forth by a proposal which involved support to religious education").

courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." [4]

Historical experience has been equally important in the frequent rejection of Establishment Clause challenges outside the parochial school context. Thus, the Court relied heavily on historical practice in upholding tax exemptions for religious groups, government funding for legislative chaplains, and religious displays.[5] In these and other areas, the Court has repeatedly "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.'" [6]

Social welfare services have historically been controlled at the state and local levels.[7] As a result, social welfare programs and patterns of religious-governmental cooperation have varied from locality to locality. Although this local diversity makes it difficult to draw generalizations, several historical themes are clear.

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[4] *Lemon v. Kurtzman*, 403 U.S. at 647-49 (Brennan, J., concurring) (listing State constitutional prohibitions against aid to sectarian schools); *Everson v. Board of Educ.*, 330 U.S. at 13-15.

[5] *See Walz v. Tax Comm'n*, 397 U.S. at 678; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

[6] *Lynch v. Donnelly*, 465 U.S. at 678, *quoting Walz v. Tax Comm'n*, 397 U.S. at 671 (emphasis in *Lynch*).

[7] "Public welfare has always been recognized as a responsibility of local government in the United States." M. Stevenson, *Public Welfare Administration* 67, 85 (1938). *See* Bremner, *Private Philanthropy and Public Needs: Historical Perspective* 95 reprinted in Commission on Private Philanthropy and Public Needs, *Research Papers* 89 (Dep't of Treasury 1977) [hereinafter *"Public Needs"*]; J. Leiby, *A History of Social Welfare and Social Work in the United States* 3-4, 25-26, 97-104 (1978) [hereinafter *"Social Welfare"*].

First, governmental aid to religious groups in the social welfare field has a long, well-established history and has played a significant role in providing social services in the United States. In the words of one authority, "[f]or over a hundred years there has existed in the United States a partnership between local governments and sectarian welfare." [8] As another commentator described:

> Until the turn of the century, local private religious and charitable organizations provided most of the relatively few social welfare services then available in this country. . . . As the cost of services began to exceed the available funds of the private charities, state and local governments began to subsidize these efforts of private welfare groups and to establish their own welfare agencies. This relationship between the Church and local governments has continued to the present day.[9]

In short, for much of the Nation's history, "[c]haritable organizations with religious affiliations . . . have provided social services with the support of . . . communities and without controversy." [10]

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[8] B. Coughlin, *Church and State in Social Welfare* 44, 129 (1965) ("there is a long legal history of government aid to sectarian health and welfare services") [hereinafter *"Church-State"*].

[9] Pickrell & Horwich, *"Religion as an Engine of Civil Policy,"* 44 Law & Contemp. Probs. 111, 112 (1981) [hereinafter *"Civil Policy"*].

[10] S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984). *See also* Stein, *Jewish Social Work in the United States, 1654-1954*, 14 in American Jewish Committee, *American Jewish Year Book* (1956) ("Sectarian auspices for charitable organizations was part of the American cultural landscape throughout the nineteenth century.") [hereinafter *"Jewish Social Work"*]; R. Bremner, *The Public Good: Philanthropy and Welfare in the Civil War Era* 184 (1980) ("Many voluntary associations [including sectarian groups] received aid from the public treasury"); J. Pratt, *Religion, Politics, and Diversity* 204-05 (1967) ("The policy of public support for private char-

Countless historical examples illustrate the long tradition of religious-governmental cooperation in the social welfare field. Thus, in California "[p]ayment of public tax funds to institutions caring for children has been the practice for decades." [11] In Kentucky, public subsidies to religious social welfare organizations were "widespread in all levels of government, state, county, and municipal" from before the turn of the century.[12] State assistance to religious groups in Missouri dates to at least 1838, with substantial assistance continuing through the 1900's.[13] In Wisconsin, a number of hospitals, orphanages, and other welfare institutions were historically operated by religious groups with public assistance.[14] In Pennsylvania, "subsidies to private agencies [had been granted] at least since 1751" and in "1929 the state granted subsidies of $3,144,050 for hospitals and an additional half million for institutions for the aged, dependent children, and others." [15]

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itable institutions was developed almost by accident in the first half of the nineteenth century.") [hereinafter *"Diversity"*]; *Public Needs*, at 103 ("throughout the greater part of American history, governmental and voluntary forces have cooperated and collaborated in meeting public needs"); G. Grob, *Mental Institutions in America: Social Policy to 1875* 82-83 (1973); *Social Welfare*, at 48-70, 75-85 ("For a long time many states and municipal authorities had helped or stimulated private philanthrophy by means of grants and concessions.").

[11] V. Bornet, *California Social Welfare* 251 (1956) (noting payments to various religious institutions).

[12] E. Sunley, *The Kentucky Poor Law 1792-1936* 30-34 (1942) (describing county and city aid to various religious groups).

[13] P. McCandless, *A History of Missouri 1820-1860* (1972); F. Boan, *A History of Poor Relief Legislation and Administration in Missouri* 48-51 (1941).

[14] R. Current, *The History of Wisconsin* 185-87, 514 (1976).

[15] A. Miles, *An Introduction to Public Welfare* 148 (1949).

Second, popular opposition to religious-governmental cooperation in the social welfare field was a relatively minor historical factor. Indeed, a sharp distinction was frequently drawn between aid for religious *social welfare* institutions (which was often expressly permitted) and aid for sectarian *schools* (which was forbidden in a number of States).[16] An overwhelming majority of State constitutions either did not forbid aid to religious organizations or prohibited aid to sectarian *schools* while specifically allowing public aid to religious groups for *social welfare* purposes.[17] A minority of the States did adopt constitutional amendments during the mid- to late-19th century more broadly forbidding state appropriations to "sectarian" institutions.[18] Nonetheless, even in these States, judicial decisions often permitted public aid for social welfare services provided by religious groups.[19]

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[16] *See Social Welfare*, at 85 ("Ultimately there was a practical compromise whereby the courts would accept public subsidies to private welfare and health institutions but not to schools."); *Church-State*, at 129 ("There is a long legal history of government aid to sectarian health and welfare services. . . . [T]he *courts have long distinguished government aid to sectarian welfare from government aid to sectarian education.*") (emphasis added); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 554-60 (1968) [hereinafter *"Nonestablishment Principle"*]; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117 (1957).

[17] *See* Appendix A.

[18] *See* Appendices B and C.

[19] *See* Appendix B.

This distinction between aid for *social welfare* and aid for parochial *schools* was also sharply drawn in the Senate debates on the short-lived "School Amendment" in 1876. These debates focussed on a proposal by James Blaine to amend the U.S. Constitution to forbid the States from using public school funds for sectarian schools. 4 Cong. Rec. 5580 (1876). In addition, a broader proposal was suggested in the Senate debates which arguably would have prevented the States from providing financial assistance to *any*

The history of aid to religious institutions in New York illustrates the sharp distinction that was ultimately drawn in many States between schooling and social welfare. Public assistance was provided to religious welfare organizations in New York from the early 1800's and "these institutions soon became integral parts of the poor relief system in the state." [20] Nonetheless, sectarian disputes led to proposals in the late 1800's to restrict aid to religious groups.[21] Importantly, however, assistance for social welfare purposes came to be viewed very differently from aid to sectarian schools. Thus, the 1894 Constitutional Convention resulted in amendments that cut off public assistance to *parochial schools*, but expressly refused to halt local aid to religious *welfare institutions*.[22]

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religious institution. *Id.* Of course, both proposals failed. Among other things, however, the debate revealed that there was virtually no support for halting aid to religious groups for social welfare purposes. Thus, some Senators who supported a ban on State aid to sectarian schools opposed any prohibition on aid for social welfare purposes. *E.g.*, 4 Cong. Rec. 5580, (Mr. Kernan); 4 Cong. Rec. 5454-56 (Mr. Randolph). Moreover, almost all supporters of either proposal denied that the amendments would prohibit aid to religious groups for social welfare purposes. *Id.* at 5584, 5585, 5594 (Mr. Christiancy, Mr. Morton). ***But cf.*** 4 Cong. Rec. 5561-62 (Mr. Frelinghuysen referring to "theological institutions, sectarian colleges, monasteries, and nunneries"). Finally, several Senators flatly expressed their opposition to any prohibition on State aid for social welfare purposes. 4 Cong. Rec. 5580-83, 5592, 5593 (Mr. Kernan, Mr. Eaton). Similarly, President Grant's 1876 State of the Union Address proposing the "School Amendment" referred only to the need for non-sectarian public schools, 4 Cong. Rec. 174, 181 (1875). *See also* 4 Cong. Rec. 5189 (House debate focussing only on aid to sectarian schools).

[20] *Diversity*, at 206-11. Appropriations to religious groups increased markedly through the 1850s and 1860s. *Id.* at 209-11. *See also* D. Schneider, *The History of Public Welfare in New York State 1609-1866* 190-91 (1938) [hereinafter *"Public Welfare."*]

[21] *Diversity*, at 215-55; *Public Welfare*, at 126-29.

[22] *Diversity*, at 254. *See* N.Y. Const. Art. 8, § 1 and Art. 11, § 3 (1895).

This compromise "did not please extremists," but it provided a "settlement that placed the explosive sectarian issue beyond the reach of partisan contention." [23] In subsequent years, public appropriations to religious welfare institutions in New York increased dramatically,[24] without significant popular opposition.[25]

A similarly pragmatic and durable compromise occurred in Louisiana. Like many other States, public appropriations were made to religious welfare institutions in Louisiana as early as 1820.[26] Public assistance had reached substantial proportions by 1879,[27] when popular opposition resulted in a constitutional amendment forbidding appropriations from the state treasury for "any church, sect or denomination or religion [or] for private,

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[23] *Diversity*, at 255. Subsequent New York judicial decisions consistently approved the continuation of public aid to religious social welfare institutions. *E.g., Sargent v. Board of Educ.*, 69 N.E. 722 (N.Y. 1904).

[24] *Diversity*, at 267-70 ("By 1914, New York City was appropriating five million dollars annually to provide welfare services, [principally] institutions conducted by one or another of the three major religious faiths.").

[25] *Id.* at 269-70 ("This compromise, observed and maintained by the state legislature, the Board of Charities, local authorities, and the state courts, has continued in the present century. . . . With the passing years, both Catholics and non-Catholics have observed the spirit of the 1894 settlement of the school and charities questions."); *Social Welfare*, at 85.

[26] E. Wisner, *Public Welfare Administration in Louisiana* 187-89 (1930) (detailing aid to numerous different Catholic, Protestant and Jewish hospitals, asylums, orphanages, and homes for the aged); E. Wisner, *Social Welfare in the South* 92-93 (1970).

[27] E. Wisner, *Public Welfare Administration in Louisiana* 189-92 (1930); E. Beven, *City Subsidies to Private Charitable Agencies in New Orleans* 24-26 (1934) [hereinafter *"City Subsidies"*].

charitable or benevolent purposes."[28] Nonetheless, public subsidies to religious social welfare groups by *municipal* authorities were allowed, and these dramatically increased in the years following 1880.[29] Similar solutions, based on the principle of local autonomy, were reached in other States.[30]

In summary, religious groups have played vital roles in federal, state, and local welfare programs for nearly 200 years. Moreover, this deeply-rooted religious-governmental cooperation has provoked relatively little popular opposition. In dramatic contrast to parochial school aid, no popular consensus emerged against public subsidy of religious welfare programs. On the contrary, most States arrived at pragmatic, durable compromises permitting public assistance to religious groups for social services. This long history of religious-governmental cooperation, which so sharply distinguishes the social welfare and parochial school contexts, should play a substantial role in interpreting the Establishment Clause.

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[28] La. Const. Art. 51 (1879). *Compare* La. Const. Art. 1, § 8.

[29] *City Subsidies*, at 25-29. *See also* R. Dripps, *The Policy of State Aid to Private Charities* 460-62, in *Proceeding of the National Conference of Charities and Correction* (1915) [hereinafter "*Private Charities*"]. Louisiana courts upheld local aid to religious welfare institutions. *State ex rel. Orr v. City of New Orleans*, 50 La. Ann. 880, 24 So. 666 (1898); La. Ops. Att'y Gen. 837 (1938-40); *Id.* at 2154 (1940-42).

[30] *See Private Charities*, at 460-62 (showing 24 states providing assistance to private charities in 1914 and noting tendency towards "greatly increased" county and city aid to private charities in other states); *Social Welfare*, at 75-85; A. Miles, *An Introduction to Public Welfare*, 148-51 (1949) ("The subsidy system became so well established . . . that by 1929 twenty-four states appropriated more than seven million dollars to private charities. In all but five states local authorities were authorized to make payments to private agencies and institutions."). *See also* Va. Const. Art. IV, § 16 and Va. Code 15.1-24-26, described in Appendix A; *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

II. RELIGIOUS GROUPS CONTINUE TO PLAY A VITAL ROLE IN CONTEMPORARY GOVERNMENTAL SOCIAL WELFARE PROGRAMS

Compelling public policies have led federal, state and local governments to continue their historic cooperation with religious groups in the social welfare field. Religious groups usually provide welfare services more efficiently and effectively than governmental agencies.[31] This is in part because religious groups often show greater "individual interest, creativity and responsibility" than their governmental counterparts, and in part because of greater experience and expertise.[32] Finally, the participation of religious groups increases the diversity of welfare services, which in turn broadens the appeal of governmental programs.[33]

Because of these compelling public policies, federal, state and local governments continue to provide substantial funding to religious groups for contemporary social welfare programs.[34] In one commentator's words, "[t]here

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[31] Religious groups often have existing facilities, as well as greater access to volunteer help or in-kind contributions than governmental agencies. *Diversity*, at 254; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117-20 (1957). In addition, religious organizations generally have extensive community contacts that governmental agencies often lack. *See* Judicial Review Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 132, 142-43 (1966) [hereinafter "*Judicial Review Hearings*"] (antipathy to "public authorities" makes church-affiliated organizations more effective).

[32] *Nonestablishment Principle*, at 555; *Church-State*, at 133-37; *Social Welfare*, at 75-89.

[33] McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 421 [hereinafter "*Disestablishment*"]; *Judicial Review Hearings*, at 132, 142-43; *Church-State*, at 128, 133-41 ("in a pluralistic society good social services . . . must be based on the principle of pluralism").

[34] Governmental funding of religious groups takes a variety of forms, including contracts for services, competitive grants to carry

are today many instances of direct state support of the welfare programs of churches and religious agencies." [35] Although there is apparently little detailed information about the precise extent of government aid to religious groups to provide social services,[36] the magnitude of such assistance is very substantial. Thus, a 1965 study concluded that "[a]n extremely large number of [religious welfare agencies], 71 percent, have contractual agreements with government agencies whereby they receive tax funds, usually by way of selling services to government." [37] More recently, a 1977 study sponsored by the Commission on Private Philanthropy and Public Needs concluded that Jewish and Catholic religious-related agencies engaged in social welfare work received 35.4% of their grants and contributions from governmental sources.[38] Reports by various religious groups, including

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out specific governmental programs, and fee reimbursement for services provided to individuals at the request of governmental agencies. *See Disestablishment*, at 420-21. The services performed by religious groups run the gamut of social service functions, from care for the homeless and aged to adoption services and day care to counseling, sexual abuse therapy, drug rehabilitation and medical care.

[35] *Nonestablishment Principle*, at 554; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117-19 (1957).

[36] *See Church-State*, at 58 (1965); Interfaith Research Committee, *A Study of Religious Receipts and Expenditures in the United States* 365 (1977) [hereinafter *"Interfaith Study"*], reprinted in Commission on Private Philanthropy and Public Needs, *Research Papers* (1977); Urban Institute, *The Reagan Experiment* 232 (1982).

[37] *Church-State*, at 74. The study also found that many religious organizations receive more than 50% of their income from government sources. *Id.*

[38] *Interfaith Study*, at 372, Table 1. If earnings, service fees, and "other" income are included, governmental grants account for 12.5% of total receipts. Jewish and Catholic religious-related agencies received some 56% of such receipts from "service fees." The extent of government responsibility for payment of service fees is not clear, but could be substantial. The study did not in-

Catholic Charities, Lutheran Social Services and Jewish Federations, reveal similar levels of governmental funding.[39]

Religious-governmental cooperation is particularly important at the state and local level. Cogent evidence of this is provided by state block grant plans, which illustrate the broad spectrum of social services provided by private religious and nonreligious organizations.[40] Similar evidence is supplied by contemporary state court decisions and commentary about social welfare services in particular states.[41] These sources, combined with extensive religious-governmental cooperation at the federal level,[42]

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clude Protestant religious-related agencies in these figures, *id.* at 372, although government payments and service fees appear to play an equally important role in Protestant welfare services. *Id.* at 371.

[39] *See* Catholic Charities USA, *1986 Annual Survey* 6, Table II.1 (showing "Government Fees and Grants" as 44.7% of income of Catholic Charities agencies total cash income in 1986 of $603,876,037). *See also* C. Chakerian, *The Churches and Social Welfare* 20 (1955); D. Gavin, *The National Conference of Catholic Charities* 176-77 (1962); J. O'Grady, *Catholic Charities in the United States* 183-225 (1930); II D. McColgan, *A Century of Charity* 439 (1951).

See 1986 Annual Report—Lutheran Social Services of Minnesota (68% of $16.6 million annual budget received from goverment fees and grants).

See Jewish Federation of Metropolitan Chicago—Annual Federation Report for 1986 (21% of $58 million budget from governemnt sources); *Jewish Social Work*, at 68-70, 256-61.

[40] *E.g., New Hampshire State Block Grant Plan, FY1986; Mississippi State Block Grant Plan, FY1986; Missouri State Block Grant Plan, FY1987* 7-13.

[41] *E.g.*, V. Bornet, *California Social Welfare* 251 (1956); A. Miles, *An Introduction to Public Welfare* 148-51 (1949). *See* cases cited in Appendices A & B.

[42] For descriptions of federal programs giving assistance to religious groups providing social welfare services, *see Judicial Review Hearings*, at 112-22, 367-78 (Memoranda of Department

demonstrate that religious-governmental cooperation continues to play a vital role in providing social welfare services. Disrupting this well-established tradition would seriously jeopardize a substantial portion of the Nation's most effective social services.

III. THE ESTABLISHMENT CLAUSE DOES NOT FORBID THE PARTICIPATION OF RELIGIOUS GROUPS IN GOVERNMENTAL SOCIAL WELFARE PROGRAMS LIKE THE ADOLESCENT FAMILY LIFE ACT

A. The District Court Erred By Mechanically Applying Parochial School Precedents in the Social Welfare Context

The three-prong *Lemon* test guides the "general nature" of Establishment Clause inquiry in parochial school cases. Nonetheless, even in this context, the Court has "emphasized that [the *Lemon* test] provides 'no more than [a] helpful sign-post.'" [43] More importantly, in cases not involving parochial schools, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion." [44] Consistent with this conviction that "no fixed, *per se* rule can be framed," the Court has frequently refused to apply the *Lemon* test outside the

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of Health, Education and Welfare). *See also* Brief on Behalf of the United States in *Bradfield v. Roberts*, 175 U.S. 291 (1899), at 11-12 ("It is a well-known fact that Congress has incorporated in the District of Columbia many . . . religious societies, some expressly under church auspices, and has made grants to such"; "it has been the practice of Congress for many years to make provision for the care of the sick and . . . for other objects of charity and reform, through appropriations for private institutions.").

[43] *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

[44] *Lynch v. Donnelly* 465 U.S. at 679.

context of primary and secondary schooling.[45] There are good reasons for limiting the *Lemon* test to cases involving the "sensitive relationship between government and religion in the education of our children." [46] As described below, an unusual constellation of problems arises from this "sensitive" educational relationship, which is largely absent in other areas, particularly the social welfare context.

A leading justification for the three-prong test has been the history of sharp controversy surrounding aid to parochial schools and the "consensus" among the States against such aid. As detailed above, no comparable history exists in the social welfare context. On the contrary, religious-governmental cooperation in the social welfare field is a well-established tradition that State constitutions often specifically preserve. This cooperation has produced a "harmonious relationship" with "beneficial and stabilizing influences in community life" that the Court has encouraged in other circumstances.[47]

A second justification for the *Lemon* test has been the felt need to safeguard the Nation's public schools. Descriptions in seminal Establishment Clause cases of the vital role of public schools illustrate the importance of this concern in the Court's reasoning. According to Justice Frankfurter, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." [48] Justice Brennan has voiced similar views: "It is implicit in the history and character of American public education that the public

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[45] *Id.* at 678. *E.g., Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982).

[46] *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985).

[47] *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970).

[48] *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). *See also* Wood, *Religion and the Public Schools*, 1986 B.Y.U.L. Rev. 349.

schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort." [49]

Given this view of public schools, the Court has repeatedly expressed its concern that religious-governmental cooperation could undercut the role of public schools in fostering national cohesion.[50] In addition, the Court has stressed the competition and "occasional rivalry" between sectarian schools and public schools, as well as the "internal pressures" driving state aid to parochial schools.[51] For these reasons, government aid to sectarian schools has been viewed with especial disfavor: "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." [52]

Concerns about the Nation's public schools have little application in the social welfare context. Despite the vital importance of welfare assistance to the needy, social welfare programs simply do not have the same role in fostering national cohesion that public schools do. Similarly, governmental welfare agencies seldom face a competitive threat from religious groups and instead have long cooperated successfully with such groups.

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[49] *Lemon v. Kurtzman*, 403 U.S. at 658 (Brennan, J., concurring), *quoting Abington School Dist. v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring). *See also Everson v. Board of Educ.*, 330 U.S. 1, 23-24 (Jackson, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

[50] *Grand Rapids Schools Dist. v. Ball*, 473 U.S. at 383; *Committee for Public Educ. v. Nyquist*, 413 U.S. at 772; *Lemon v. Kurtzman*, 403 U.S. at 624; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. at 231 (Frankfurter, J., concurring).

[51] *Grand Rapids School Dist. v. Ball*, 473 U.S. at 383; *Lemon v. Kurtzman*, 403 U.S. at 624.

[52] *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. at 231 (Frankfurter, J., concurring) (emphasis added).

Third, the participation of religious groups in social welfare programs lacks the potential for religious indoctrination that sectarian schools possess. The Court has frequently emphasized the unique capacity of "pervasively sectarian" schools for religious indoctrination: these schools are "a powerful vehicle for transmitting [religious] faith to the next generation," [53] whose dominant purpose is "assur[ing] future adherents to a particular faith." [54] The potential for religious indoctrination is greatly enhanced by the "impressionable" age of students and by the fact that primary and secondary education is an ongoing activity that dominates the lives of students.[55]

In contrast, welfare programs often have comparatively limited capacity for religious indoctrination. Social welfare programs typically involve more mature clients whose contacts with the program's operators are much more limited and structured.[56] Similarly, many social services involve trained professionals who are subject to ethical rules and professional standards that inhibit prosyletiz-

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[53] *Lemon v. Kurtzman*, 403 U.S. at 616.

[54] *Walz v. Tax Comm'n* 397 U.S. at 671. *See also Aguilar v. Felton*, 473 U.S. 402, 411-13 (1985); *Lemon v. Kurtzman*, 403 U.S. at 616; *id.* at 628, 635, 641 (Douglas, J., concurring); *id.* at 658 (Brennan, J., concurring); *Meek v. Pittenger*, 421 U.S. at 366; *Board of Educ. v. Allen*, 392 U.S. 236, 245, 247-48 (1968).

[55] *E.g., Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 752-53 (1976); *Grand Rapids School Dist. v. Ball*, 473 U.S. at 385.

[56] Primary and secondary schooling typically occupies a major part of students' waking hours for most months during a twelve year period. In contrast, social welfare programs (like emergency shelters or medical care) usually involve short-term contacts, both in terms of hours per week and length of treatment. Similarly, primary and secondary education is broad in focus and subject matter, with comparatively few structures or limits. In contrast, many social welfare services (like medical care or drug abuse treatment) are comparatively narrow in their focus and purpose.

ing.[57] Finally, welfare programs typically occur within a community context that restricts religious indoctrination.[58]

As all this illustrates, the social welfare context lacks the uniquely controversial history, the role in fostering national cohesion, and the potential for religious indoctrination that exists in primary and secondary education.[59] These fundamental differences between primary or secondary schooling and social welfare programs make the three-prong *Lemon* test inappropriate in social welfare cases such as this.

Rather than mechanically applying the *Lemon* test, the lower court should have applied this Court's only previous Establishment Clause precedent in the social welfare field.

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[57] Identical considerations have led the Court to distinguish sharply between aid to higher education institutions and aid to primary or secondary schools. *See Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

[58] *Nonestablishment Principle*, at 556 ("The interfaith composition of the staffs and patients of church-related health agencies, for example, makes the welfare aspects of these organizations in the public mind far overshadow their religious attributes."); *Judicial Review Hearings*, at 125-27 ("representative nature of the community action agency . . . represents one safeguard").

[59] Social welfare programs, of course, involve a wide variety of services. Indeed, AFLA itself contemplates a considerable range of social services. 42 U.S.C. 300z-1(a)(4). Some social services bear closer resemblances to primary and secondary education than others. *See, e.g., Church-State*, at 48-56, 57 ("There are . . . instances in which areas of aid to sectarian welfare and education overlap.") For example, counselling resembles education more than transportation programs or soup kitchens do. Nonetheless, while generalizations are difficult, counselling typically involves far more limited, structured and discrete contact with clients than does primary or secondary schooling. Likewise, the professional training and standards of counsellors minimize the potential for religious indoctrination, as does the interfaith character and community representation of many religious social welfare programs.

In *Bradfield v. Roberts*, the Court considered an Establishment Clause challenge to a federal grant of $30,000 to a hospital operated by a congressionally-chartered corporation "composed of members of a monastic order or sisterhood of the Roman Catholic Church." 175 U.S. at 297-298. Although the Roman Catholic Church "exercise[d] great and perhaps controlling influence over the management of the hospital," *id.* at 298, the *Bradfield* Court unanimously upheld Congress's grant.

Two controlling principles governing aid to religious groups for social welfare programs emerge from *Bradfield*: (1) the federal grant was used to fund a secular social welfare service, namely providing "for the care of . . . sick and invalid persons;"[60] and (2) the federal grant was generally available on a nondiscriminatory basis for the benefit of both religious and nonreligious persons.[61] Subsequent decisions of this Court have specifically reaffirmed *Bradfield*,[62] generally interpreting the opinion as reflecting the two foregoing guidelines. Thus, in *Roemer v. Maryland Public Works Board*, Justice Blackmun observed that *Bradfield* "upheld the extension of

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[60] *Bradfield v. Roberts*, 175 U.S. at 297, *quoting* Act of April 8, 1864, ch. 50, § 2, 13 Stat. 43. *See also id.* at 299-300.

[61] *Id.* at 295, 299-300 (emphasizing that the appropriation was contained in a "general appropriation act" that did not require aid to religious groups and that the hospital's "powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution"). The *Bradfield* opinion noted that the Providence Hospital had a congressional charter that made no reference to religious objectives. 175 U.S. at 297. The Court, of course, did not suggest that a "secular" corporate charter would insulate religious groups from Establishment Clause challenges. *Id.* at 298 ("There is no allegation that . . . in its management the hospital has been conducted so as to violate its charter").

[62] *E.g., Lemon v. Kurtzman*, 403 U.S. at 633 (Douglas, J., concurring); *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 746 (plurality opinion of Blackmun, J.); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood . . . was limited by its corporate charter to the *secular purpose of operating a charitable hospital.*" [63] The opinion's discussion of *Bradfield* continued with an explanation that "religious institutions need not be quarantined from public benefits that are *neutrally available to all.*" [64] The two *Bradfield* guidelines are also reflected in the Court's later Establishment Clause decisions outside the social welfare field [65] and in cogent academic commentary.[66]

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[63] 426 U.S. at 746 (plurality opinion of Blackmun, J.) (emphasis added).

[64] *Id.* at 746 (emphasis added). *See Widmar v. Vincent*, 454 U.S. 263 (1981).

[65] *See Tilton v. Richardson*, 403 U.S. at 676-77, 679 (plurality opinion of Burger, C.J.) (noting that "Congress intended the Act to include all colleges . . . regardless of any affiliation with . . . a religious body" and that the Act ensured aid would be devoted to "secular . . . function[s]"); *Hunt v. McNair*, 413 U.S. at 741, 744 ("benefits of the Act are available to all institutions . . . whether or not having a religious affiliation" and assistance was for "secular activities"); *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 740, 759-60 (funds for "any private institution of higher learning" and not for "specifically religious activity").

In *Roemer, Tilton, Hunt* and *Widmar* the Court also applied *Lemon's* so-called "entanglement" analysis. As the absence of any entanglement inquiry in *Bradfield* demonstrates, no such analysis is appropriate in social welfare cases. There are good reasons not to extend *Lemon's* "entanglement" prong to the social welfare context. *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting); *Committee for Public Educ. v. Nyquist*, 413 U.S. at 813 (White, J., dissenting). *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1392-94 (1981); *Lee, The Religion Clauses: Problems and Prospects*, 1986 B.Y.U.L. Rev. 337, 340-42. Religious groups and governmental units have long cooperated in providing welfare services without becoming particularly "entangled." *See Judicial Review Hearings*, at 138-45; *Diversity*, at 269 ("a close working relationship has grown up between public welfare officials and religious charitable organizations"). Equally important, the lower court's order would itself produce difficult entanglement issues such as defining whether a group is "religious." *Judicial Review Hearings*, at 46 ("the question of what is a denominational or church-related institution is a very difficult one to resolve"); *Walz v. Tax Comm'n*, 397 U.S. at 698-99 (Harlan, J., concurring) (risk of "entang[ling] government in difficult classifications of what is or is not [a] religious organization").

The *Bradfield* decision, of course, provides no mechanical test for determining when a particular activity is "secular" rather than "religious." As the Court has observed elsewhere, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." [67] Among the circumstances relevant to determining whether a particular activity is "secular" are the purpose of the activity, the extent to which purely secular groups engage in such activities, the similarities of the activity to pure religious worship or indoctrination, the character of the organization engaging in the activity, and the setting where the activity occurs.[68]

B. There is No Basis for a Facial Establishment Clause Challenge to the Act

There is no basis under the two *Bradfield* guidelines for a facial Establishment Clause challenge to AFLA. First, the Act does no more than authorize federal fund-

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[66] *Church-State*, at 44-57, 127-49; *Nonestablishment Principle*, at 554-60; *Disestablishment*, at 405.

[67] *Lemon v. Kurtzman*, 403 U.S. at 614. *See also Roemer v. Maryland Public Works Bd.*, 426 U.S. at 760; *Board of Educ. v. Allen*, 392 U.S. at 242; *Tilton v. Richardson*, 403 U.S. at 677 (plurality opinion of Burger, C.J.).

[68] *E.g., Tilton v. Richardson*, 403 U.S. at 679-82 (plurality opinion of Burger, C.J.).

ing for both nonreligious and religious groups on an entirely neutral basis. The language of AFLA includes religious groups among the organizations entitled to receive federal grants, but contains no requirements or preferences regarding these groups.[69] Similarly, the legislative history of AFLA expressly reaffirms the statute's neutrality.[70] Finally, there is no suggestion that AFLA grantees have discriminated on the basis of religion in providing services.

Second, the Act plainly satisfies *Bradfield*'s requirement that governmental funding be available for secular activities. Many of the services provided for by AFLA—like postnatal medical care and transportation—are indisputably secular. These services are routinely provided by wholly nonreligious organizations and have no connection to religious doctrine or practices. Moreover, these services could readily be provided in settings with few religious overtones by groups with minimal religious affiliation.[71] Given these obviously constitutional possibil-

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[69] The Act is thus identical in substance and effect to the statutes upheld in *Roemer*, *Tilton*, and *Hunt*. *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 740-44 (state law providing funding for "any private institution of higher learning" but not for "sectarian purposes"); *Tilton v. Richardson*, 403 U.S. at 676-77 ("Congress intended the Act to include all colleges and universities regardless of any affiliation with . . . a religious body"); *Hunt v. McNair*, 413 U.S. at 736-39 (aid to "assist institutions for higher education" but not for facilities used for sectarian instruction or worship).

[70] "Religious affiliation is not a criterion for selection as a grantee . . . but any such grants . . . would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. No. 161, 97th Cong., 1st Sess. 16 (1981).

[71] Even in the context of "pervasively sectarian" parochial schools, public funding for "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." *Lemon v. Kurtzman*, 403 U.S. at 616-17.

ities for AFLA funding, appellees clearly cannot satisfy the well-settled rule that a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." [72]

The district court ignored the Act's provision of funding for these obviously secular services, narrowly focusing instead on AFLA's funding for counselling programs. The court devoted particular attention to the Act's prohibition against grants for projects providing abortion: "[i]t is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful . . . . [B]y contemplating the provision of aid to organizations affiliated with these religions . . . AFLA contemplates subsidizing a fundamental religious mission of these organizations." [73]

Contrary to the district court's suggestion, the counselling contemplated by AFLA clearly *can* be provided in circumstances in which such counselling would constitute a "secular" activity. Congress's purposes in funding such counselling—coping with the severe economic, social and health problems caused by premarital teenage pregnancies—were indisputably secular.[74] Moreover, there is nothing inherently sectarian about counselling services, which can readily be provided without reference to religious doctrine. Indeed, countless therapists with absolutely no religious affiliations provide such services on a daily basis all around the country.[75]

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[72] *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987); *Schall v. Martin*, 467 U.S. 253, 268-69 n. 18 (1984); *New York v. Ferber*, 458 U.S. 747 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

[73] *Kendrick v. Bowen*, 657 F. Supp. at 1563.

[74] See 42 U.S.C. 300z(a)(5) (1982) & pp. 26-27.

[75] *See, e.g., Bradfield v. Roberts*, 175 U.S. 291 (1899); *Walz v. Tax Comm'n*, 397 U.S. at 693 ("The means churches use to carry on their public service activities are not 'essentially religious' in

Nor is the secular character of the counselling services that could be provided under AFLA affected by the fact that the Act contemplates that grantees may encourage sexual restraint and adoption. The Court has frequently remarked that "[i]t is well settled . . . that a regulation does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.' "[76] On the contrary, harmonization of government policy with religious precepts is permissible so long as there is a "neutral, secular basis" for AFLA's treatment of sexual restraint and adoption.[77] Congress's findings make it clear that AFLA's encouragement of adoption and sexual restraint among unwed adolescents has a "neutral, secular basis" of the highest order—the protection of the public health.[78]

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nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities.") (Brennan, J., concurring). For example, a religious service organization with minimal connections to its sponsor might provide counselling with no sectarian overtones in a secular surrounding. There would be no basis for characterizing this sort of counselling as "religious activity."

[76] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)); *Gillette v. United States*, 401 U.S. 437, 452 (1971).

[77] *Id.* at 452; *McGowan v. Maryland*, 366 U.S. at 442.

[78] Congress specifically made detailed factual findings about the "severe adverse health, social, and economic consequences" of premarital pregnancy and childbirth. In particular, Congress noted a number of serious health and social risks faced by unmarried adolescent mothers and their children: a "higher percentage of pregnancy and childbirth complications"; a "higher frequency of developmental disabilities"; "higher infant mortality and morbidity"; and "higher risks of unemployment and welfare dependency." *See* 42 U.S.C. 300z(a)(5) (1982).

Indeed, the Court squarely held in *Harris v. McRae*, that the fact that a prohibition of funding for abortions "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." 448 U.S. 297, 319-

The extraordinary breadth of the district court's rationale demonstrates the error in holding AFLA facially unconstitutional. According to the lower court, the Act is unconstitutional because governmental funding of counselling about premarital sex and adoption would "subsidiz[e] a fundamental religious mission of [religious] organizations." 657 F. Supp. at 1563. This logic condemns literally every social welfare service provided by religious groups. Feeding the hungry, sheltering the homeless, tending the sick, and counselling the bereaved are all "fundamental religious mission[s]" of religious groups. If applied consistently, the district court's sweeping rationale would forbid government aid for all these services, thereby threatening countless welfare programs all around the Nation. Nothing in the Establishment Clause requires a result that is so harsh and so inconsistent with our history.[79]

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20 (1980). *See also Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984). The Court in *McRae* concluded flatly that " 'traditionalist' values towards abortion" provided a valid basis for prohibiting the funding of abortions. 448 U.S. at 319. The extensive congressional findings regarding the medical and social effects of teenage pregnancies make this case all the easier.

[79] The district court's conclusion ignored Congress's consideration of possible Establishment Clause defects in AFLA, and its conclusion that no such defects existed. *See* S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981) ("promoting the involvement of religious organizations . . . is neither inappropriate or illegal"); S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984). It is well-settled that substantial deference should be accorded the considered views of coordinate branches of Government. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Marsh v. Chambers*, 463 U.S. at 791, 793-94; *Mueller v. Allen*, 463 U.S. at 396. Judicial deference to the conclusions of coordinate branches of Government is particularly appropriate where, as here, a facial challenge to an Act of Congress turns upon broad questions of legislative fact.

C. The District Court Erred in Striking Down the Act on "As-Applied" Grounds

The district court's conclusion that AFLA was unconstitutional "as-applied" is also seriously flawed.[80] The district court rested its decision on conclusory generalizations about "some" or "several" AFLA grantees and isolated aspects of a few projects. This broad-brush approach falls far short of the standards that must be satisfied to invalidate an Act of Congress on Establishment Clause grounds.[81]

There could be circumstances in which AFLA grantees used funds for counselling that was so pervaded with religious imagery, doctrine and purpose that otherwise secular activities would be converted into religious worship or indoctrination. Such conduct would, of course, violate AFLA itself, quite apart from the Establishment Clause.[82] There appears, however, to be very little in the lower court's opinion supporting a conclusion that AFLA funds were improperly used for religious activities.[83] The fact that AFLA grantees had religious affiliations does

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[80] The district court nowhere suggested that AFLA grants were in fact not awarded in a neutral, nondiscriminatory manner. Indeed, only 25% of the AFLA grantees have been religiously affiliated (Decl. of Jo Ann Gasper, May 12, 1987). Accordingly, the first of the *Bradfield* guidelines is satisfied.

[81] *Lemon v. Kurtzman*, 403 U.S. at 614; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 755-61; *Wolman v. Walter*, 433 U.S. 229, 236-54 (1977).

[82] *See* S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984). *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[83] It is, as shown earlier, irrelevant that some religious groups received funds for counselling about issues coinciding with their religious tenets. *See* p. 26 *supra*. Similarly, the purposes of the AFLA grants were entirely secular and all of the challenged counselling services could readily have been performed by wholly secular entities. *See* pp. 24-25 *supra*.

not, of course, render the grantees' activity religious.[84] Similarly, the presence of religious symbols in the places that AFLA counselling occurred is of minimal importance.[85] Finally, a balanced treatment of both "theological and secular views on secular conduct," even using "explicitly religious materials," provides no basis for concluding that religious indoctrination has occurred.[86]

Because the district court made no adequate findings regarding specific programs, because it did not consider whether the activities in such programs were prohibited by AFLA, and because the relief it ordered was directed broadly against the entire AFLA program, the district court's "as-applied" holding should be reversed.

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[84] 657 F. Supp. at 1564-65. In *Bradfield v. Roberts*, the hospital receiving federal aid was "composed of members of a monastic order" and the Roman Catholic Church "exercise[d] great and perhaps controlling influence over the management of the Hospital." 175 U.S. at 297-98. Under *Bradfield* the mere fact that a religiously controlled institution provides services does not mean that those services constitute religious activity. Indeed, a group's religious affiliation is a relatively minor factor in determining whether its activity is secular.

[85] 657 F. Supp. at 156. *See Lynch v. Donnelly*, 465 U.S. at 681-83; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 756.

[86] 657 F. Supp. at 1565. *See Roemer v. Maryland Public Works Bd.*, 426 U.S. at 756 ("Mandatory religious or theology courses are taught . . . primarily by Roman Catholic clerics, but these only supplement a curriculum covering 'the spectrum of a liberal arts program' ").

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

GARY B. BORN
Counsel of Record
R. SCOTT KILGORE
WILMER, CUTLER & PICKERING *
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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* Robert Swanson assisted in the preparation of this Brief.

APPENDICES

APPENDIX A

States in Which Language of State Constitution Permits Aid to Religious Groups for Social Welfare Purposes

1. *Alabama*—Ala. Const. Art. IV, § 73, permits aid to private charitable or educational organizations on two-thirds vote of legislature; Ala. Const. Art. XIV, § 263, only forbids use of public school funds for "sectarian or denominational school[s]." See *Alabama Education Ass'n v. James*, 373 So.2d 1076 (Ala. 1979).

2. *Alaska*—Alaska Const. Art. VII, § 1, forbids only payment of public funds to any "religious or other private educational institution." *See Lien v. City of Ketchikan*, 383 P.2d 721 (Alas. 1963); 1959 Op. Att'y Gen., No. 19 (Alas. 1959).

3. *Arkansas*—Ark. Const. Art. XIV, § 2, only requires use of public school fund for dedicated purposes. *Cf. Cortez v. Independence County*, 698 S.W.2d 291 (Ark. 1985).

4. *California*—Cal. Const. Art. IX, § 8, and Art. XVI, § 3, prohibit only public funding of sectarian schools, and permit aid for defined social welfare purposes. *See* Cal. Op. Att'y Gen. No. 82-509 (1983).

5. *Connecticut*—Conn. Const. Art. VIII, only prohibits use of public school fund for purposes other than public schooling.

6. *Delaware*—Del. Const. Art. X, § 3, only prohibits using educational funds for any "sectarian, church or denominational school."

7. *Hawaii*—Haw. Const. Art. X, § 1, only prohibits using public funds for "any sectarian or private educational institution."

8. *Idaho*—Idaho Const. Art. IX, § 5, permits funding for religious health facilities. *See Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Auth.*, 531 P.2d 588 (Idaho 1974).

9. *Iowa*—Iowa Const. Art. IX, § 2, requires University funds to be used solely for State University.

10. *Kansas*—Kan. Const. Art. VI, § 6(c) and Kan. Const. Art. 6, § 8 (1861), only forbid "religious sect or sects" from controlling "public education funds." *See* Kan. Op. Att'y Gen. No. 78-392 (1978).

11. *Kentucky*—Ky. Const. § 189, only forbids using "educational" funds for "any church, sectarian or denominational school." *See Abernathy v. City of Irvine*, 355 S.W.2d 159 (Ky. 1961), *cert. denied*, 371 U.S. 831 (1962); *Kentucky Building Comm'n v. Effron*, 220 S.W.2d 836 (Ky. Ct. Apps. 1949).

12. *Louisiana*—La. Const. Art. I, § 8 and La. Const. Art. IV, § 8 (1921) and La. Const. Art. 51 (1879), permitted local (but not state) aid to religious groups for social welfare purposes. *See State ex rel. Orr v. City of New Orleans*, 24 So. 666 (La. 1898); La. Op. Att'y Gen. 837 (1938-40).

13. *Maine*—Maine Const. Art. I, § 3. *See Squires v. Augusta*, 153 A.2d 80 (Me. 1959).

14. *Minnesota*—Minn. Const. Art. XIII, § 2, only prohibits public funding of "schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."

15. *Mississippi*—Miss. Const. § 208 only forbids "religious or other sect or sects" from controlling public "educational funds" and public funding of any "sectarian school." *See Craig v. Mercy Hospital—Street Memorial*, 45 So.2d 809 (Miss. 1950) and 47 So.2d

867 (Miss. 1950); *In re: Validation of $15,000,000 Hospital Revenue Bonds*, 361 So.2d 44 (Miss. 1978).

16. *Nebraska*—Neb. Const. Art. VII, § 11, only forbids public funding of any private "school or institution of learning," except for handicapped children receiving "nonsectarian" instruction. *See* Neb. Op. Att'y Gen. No. 103 (1981) (dicta).

17. *New Hampshire*—N.H. Const. Art. 83, only forbids public funding of "schools or institutions of any religious sect or denomination." *See Opinion of the Justices*, 113 A.2d 114 (N.H. 1955).

18. *New Mexico*—N.M. Const. Art. IV, § 31 and Art. IX, § 14 and Art. XII, § 3, only forbid public funding of "any sectarian, denominational or private school, college or university" and authorizes local and state assistance for defined charitable activities.

19. *New York*—N.Y. Const. Art. XI and Art. XVIII, § 3, only forbid public funding of "any school or institution of learning wholly or in part under the control or direction of any religious denomination," but permit local public aid for social welfare purposes. *See Sargent v. Board of Education*, 69 N.E. 722 (N.Y. 1904); *Shepherd's Fold of Protestant Church v. New York*, 96 N.Y. 137 (1884).

20. *North Carolina*—N.C. Const. Art. IX, § 6 and § 7, only require use of state and county school funds for "public schools." *See* 43 N.C.A.G. 189 (1973).

21. *North Dakota*—N.D. Const. Art. VIII, § 5 and Art. XII, § 185, only forbid use of public school funds for "any sectarian school" and specifically permit funding for "reasonable support of the poor."

22. *Ohio*—Ohio Const. Art. VI, § 2, only forbids any "religious or other sect, or sects," from controlling "the school funds of this state." *See Lazarus v.*

Board of Commissioners, 217 N.E.2d 883 (Ohio 1966).

23. *Pennsylvania*—Pa. Const. Art. III, § 17 and § 18 and Art. X, § 2 (1874), permit appropriations to private charitable and educational institutions, including "denominational and sectarian" institutions, upon two-thirds vote or for specified social welfare purposes. *See Shade v. Allegheny County Institution Dist.*, 126 A.2d 911 (Pa. 1956). *But see Collins v. Martin*, 139 A. 122 (Pa. 1927); *Collins v. Kephart*, 117 A. 440 (Pa. 1921).

24. *Rhode Island*—R.I. Const. Art. XII, § 2, only requires use of public schools funds for dedicated purposes.

25. *Tennessee*—Tenn. Const. Art. I, § 3 and Art. XI, § 12, do not forbid public aid to religious groups for social welfare purposes. *See* Tenn. Op. Att'y Gen. 80-32 (1980).

26. *Utah*—Utah Const. Art. II, § 4 and Art. X, § 13, only require public schools to be free from "sectarian control" and forbid appropriations to any "school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever." *See Manning v. Sevier County*, 517 P.2d 549 (Utah 1973); *Stone v. Salt Lake City*, 356 P.2d 631 (Utah 1960), *cert. denied*, 365 U.S. 860 (1961).

27. *Vermont*—Vt. Const. Art. 3, contains no prohibition on public funding of religious groups for social welfare purposes. *See Vermont Educational Buildings Financing Agency v. Mann*, 247 A.2d 68 (Vt. 1968).

28. *Virginia*—Va. Const. Art. IV, § 16, permits General Assembly to authorize "counties, cities, or towns" to make appropriations to "any charitable institution or association," while forbidding state funding of

"church[es] and sectarian societ[ies]." *See* Va. Code § 15.1-24, § 15.1-25 and § 15.1-26 (permitting appropriations for YMCA and YWCA; permitting "contracts with any sectarian institution for the care of indigent, sick or injured persons"; and forbidding other appropriations to sectarian societies).

29. *West Virginia*—W. Va. Const. Art. III, § 15 and Art. XII, § 2 and § 5, only forbid aid for "the erection or repair of any house for public worship, or for the support of any church or ministry." *See* 57 W. Va. Op. Att'y Gen. 201 (1977).

APPENDIX B

States in Which State Courts or Attorneys General Permit Aid to Religious Groups for Social Welfare Purposes

1. *Arizona*—Ariz. Const. Art. II, § 12; Art. IX, § 10; Art. XI, § 8. *See Community Council v. Jordan*, 432 P.2d 460 (Ariz. 1967); Op. Att'y. Gen. No. 187-033 (Ariz.)

2. *Colorado*—Colo. Const. Art. V, § 34; Art. IX, § 7. *See Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

3. *Florida*—Fla. Const. Art. I, § 3 & § 6. *See Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952); *Nohrr v. Brevard County Educational Facilities Auth.*, 247 So.2d 304 (Fla. 1971); Op. Att'y. Gen. 284 (Fla. 1939).

4. *Georgia*—Ga. Const. Art. I, § 11, ¶ VII. *See Bradfield v. Hospital Authority of Muscogee County*, 176 S.E.2d 92 (Ga. 1970). *But see Bennet v. City of La Grange*, 112 S.E. 482 (Ga. 1922); *Savannah v. Richter*, 127 S.E. 148 (Ga. 1925).

5. *Illinois*—Ill. Const. Art. X, § 3. *See St. Hedwig's School v. Cook County*, 124 N.E. 629 (Ill. 1919); *Dunn v. Chicago Industrial School*, 117 N.E. 735 (Ill. 1917), *overruling Cook County v. Chicago Industrial School*, 18 N.E. 183 (Ill. 1888).

6. *Maryland*—Md. Const. Art. 36 and Art. 38. *See St. Mary's Industrial School for Boys v. Brown*, 45 Md. 310 (1876); *Finan v. Mayor & City Council of Cumberland*, 141 A. 269 (Md. 1928); *Truitt v. Board of Public Works*, 221 A.2d 370 (Md. 1966).

7. *Massachusetts*—Mass. Const. Art. XLVI, § 2. *See* Op. Att'y Gen. 132 (1942).

8. *Michigan*—Mich. Const. Art. I, § 4. *Ellis v. City of Grand Rapids*, 257 F. Supp. 564 (W.D. Mich. 1966).

9. *Missouri*—Mo. Const. Art. I, § 7. *See Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979) (en banc).

10. *Montana*—Mont. Const. Art. V, § 11 and Art. X, § 6. *See* Mont. Op. Att'y Gen. No. 165 (1978).

11. *Nevada*—Nev. Const. Art. XI, § 10. *See* Att'y Gen. Op. B-40 (2-11-1941). *But see State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882).

12. *New Jersey*—N.J. Const. Art. VIII, § III, ¶ 3. *See St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935 (N.J. 1983); *Makar v. St. Nicholas Ruthenian Greek Catholic Church*, 187 A.2d 353 (N.J. 1963).

13. *Oklahoma*—Okla. Const. Art. I, § 5 and Art. II, § 5. *See Murrow Indian Orphans Home v. Childers*, 171 P.2d 600 (Okla. 1946); *State v. Williamson*, 347 P.2d 204 (Okla. 1959); *Tulsa Area Hospital Council Inc. v. Oral Roberts University*, 626 P.2d 316 (Okla. 1981).

14. *Oregon*—Ore. Const. Art. I, § 5. *See* Att'y Gen. Op. 1956-58, p. 257; Att'y Gen. Op. 1966-68, p. 351; Att'y Gen. Op. Vol. 44, No. 8148 (1982); Att'y Gen. Op. No. OP 5726 (1985).

15. *South Carolina*—S.C. Const. Art. XI (1895) and S.C. Const. Arts. X, § 11 and XI, § 4. *See* S.C. Op. Att'y Gen. No. 3831 (1974).

16. *Washington*—Wash. Const. Art. I, § 11 and Art. IX, § 4. *See Washington Health Care Facilities Authority v. Spellman*, 633 P.2d 866 (Wash. 1981).

17. *Wisconsin*—Wis. Const. Art. I, § 18 and Art. X, § 3 prohibit appropriations for "religious societies, or religious or theological seminaries." *See State ex. rel. Wisconsin Health Facilities Authority v. Lindner*, 280 N.W.2d 773 (Wis. 1979); *State ex. rel. Warren v. Nusbaum*, 219 N.W.2d 577 (Wis. 1974); Op. Att'y Gen. 53-87 (1987); 21 Op. Att'y Gen. 727 (1932).

APPENDIX C

States in Which State Constitution Apparently Forbids Direct Government Aid to Religious Groups for Social Welfare Purposes

1. *Indiana*—Ind. Const. Art. VIII, § 7. *See* Op. Att'y Gen. 356 (1934).
2. *South Dakota*—S.D. Const. Art. VI, § 3 and Art. VIII, § 16. *See Synod of Dakota v. State*, 50 N.W. 632 (S.D. 1891).
3. *Texas*—Tex. Const. Art. I, § 7 and Art. VII, § 5. *See Church v. Bullock*, 109 S.W. 115 (Tex. 1908); Op. Att'y Gen. No. M-1255 (1972).
4. *Wyoming*—Wy. Const. Art. 1, § 19 and Art. VIII, § 4 and § 12.